The meeting was called to order at 10.20 a.m.

CONSIDERATION OF THE QUESTION CONCERNING THE FINALIZATION AND ADOPTION OF A CONVENTION ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTIONS 51/207 OF 17 DECEMBER 1996 AND 52/160 OF 15 DECEMBER 1997 (*continued*) (A/CONF.183/2/Add.1 and Corr.1; A/CONF.183/C.1/L.45/Add.3, L.59 and Corr.1 and L.61; A/CONF.183/C.1/WGAL/L.2; A/CONF.183/C.1/WGE/L.14/Add.1; A/CONF.183/C.1/WGPM/L.2/Add.6)

Part 2 of the draft Statute (*continued*)

Proposal prepared by the Bureau

1. **The CHAIRMAN** invited the Committee to begin consideration of the proposal for Part 2 prepared by the Bureau and contained in document A/CONF.183/C.1/L.59 and Corr.1, some of whose provisions repeated or modified those contained in document A/CONF.183/C.1/L.53. Ways must now be found of resolving a number of hitherto intractable issues. It was not enough merely to advocate inclusion of elements in the Statute, without also giving thought to the problems that would result from their inclusion.

2. The Bureau invited comments on five specific issues: acceptance of the jurisdiction of the Court, automatic or opt-in; preconditions for the exercise of jurisdiction; the options for suspension of investigation or prosecution by the Security Council; the desirability of additional safeguards for the Prosecutor's role; and the desirability of a provision—binding or otherwise—on elements of crimes.

3. **Mr. van HEBEL** (Netherlands), Coordinator, introducing document A/CONF.183/ C.1/L.59, said that with respect to article 5 the Bureau proposed that the jurisdiction of the Court should be limited to genocide, crimes against humanity and war crimes. If no agreement was reached in the course of that day as to whether the crime of aggression and one or more of the treaty crimes should be included, the interest in addressing those crimes might have to be reflected in some other manner.

4. Inclusion of crimes of sexual violence under crimes against humanity and war crimes was taken for granted. However, differences remained as to the drafting of the relevant provisions. Certain proposals made on the inclusion of terrorism and economic embargoes under crimes against humanity also required further discussion.

5. Two options were proposed for the *chapeau* of article 5 *quater*, dealing with the Court's jurisdiction in respect of war crimes. Section B of the definition of war crimes contained a new paragraph (a *ter*) relating to United Nations and other personnel involved in humanitarian assistance or peace-keeping missions.

6. Paragraph (o), on weapons, was based on the first of the three options contained in the corresponding provision in discussion paper A/CONF.183/C.1/L.53, and contained a short list of weapons generally considered to be prohibited in international armed conflicts. Subparagraph (vi) of paragraph (o), on weapons that might subsequently be prohibited in accordance with the articles on amendments and on review procedure, might require further drafting.

7. The *chapeau* of section D, on internal armed conflicts, had been amended, and a higher threshold was now proposed with respect to what should be considered an armed conflict not of an international character. Paragraph (e) had been deleted, as it duplicated paragraph (b) in section C. In paragraph (f), the words "or groups", which had

been inadvertently omitted, should be inserted after the words "armed forces". Section D now concluded with a clause stating that nothing in sections C and D affected the responsibility of Governments to maintain or re-establish law and order by all means consistent with international law. The drafting of a new provision, article xx, on "Elements of crimes", might require further clarification or improvement.

8. Articles 6, 7, 7 *bis* and 7 *ter* related to the acceptance and exercise of jurisdiction. Jurisdiction involved three stages: acceptance, preconditions, and exercise proper. The first stage was covered in article 7 *bis*, which contained two options. Option 1 provided for automatic jurisdiction over all three core crimes, without the need for any extra measure or declaration on the part of the State party. Option 2 provided for automatic jurisdiction over genocide and opt-in for crimes against humanity and war crimes.

9. As to preconditions for the exercise of jurisdiction, the second stage, under article 7, paragraph 1, the Court would be able to exercise jurisdiction over genocide if one or more of the States mentioned in its subparagraphs (a) to (d) had accepted its jurisdiction. However, there were three options with respect to preconditions for crimes against humanity and war crimes. Option 1 was identical to the proposal relating to the preconditions for genocide. Option 2 required a higher threshold, because the Court would have jurisdiction only if both the territorial State and the custodial State had accepted that jurisdiction. Option 3 required only the State of nationality of the accused to have accepted jurisdiction. However, if the State in question was not a party to the Statute or had not accepted jurisdiction, then under article 7 *ter* it could by declaration consent to the exercise of jurisdiction with respect to the crime in question.

10. As to exercise of jurisdiction, the third stage, under article 6 (a) taken in conjunction with article 11, the Court could exercise jurisdiction if a situation was referred to it by a State party. Under article 6 (b) the Security Council, acting under Chapter VII of the Charter, could refer such a situation to it. Under article 6 (c), the Prosecutor could initiate an investigation in accordance with article 12.

11. Article 10 concerned not the Security Council's role in referring a matter or situation to the Court but its power of requesting the suspension of an investigation or prosecution if an issue under Chapter VII arose that was also the subject of an investigation or prosecution by the Court. Of the options, one provided for a period of twelve months for which a suspension might apply, while a second provided for "a specified period of time", but did not specify its duration.

12. Article 12 provided for two options in relation to the role of the Prosecutor in initiating investigations *proprio motu*. A version of option 1 had already featured in discussion paper A/CONF.183/C.1/L.53. Option 2 raised the general question of whether additional safeguards were needed before the Prosecutor could act.

13. **Mr. HAFNER** (Austria), speaking on behalf of the European Union and its member States, said that the Union strongly supported the procedure adopted in the Bureau proposal as the most appropriate way of achieving a compromise on a number of very difficult issues. It noted that the Bureau had not yet been able to find a way of including the crime of aggression in the draft Statute but would propose that the interest in addressing that crime should be reflected in some other manner. The European Union was of the view that the issue could best be dealt with either directly in the Final Act or in a resolution attached to it.

14. As to the *chapeau* of article 5 *quater*, on war crimes, the European Union supported the formulation contained in option 2. Section D of article 5 *quater* was preceded by a reference to armed conflict between armed forces and dissident armed forces or other organized armed groups. That reference needed also to cover conflicts in which only organized armed groups were engaged, regardless of whether they exercised control over territory.

15. The new article xx, on elements of crimes, should be seen as an effort to achieve a compromise. The European Union considered that elements of crimes should take the form of guidelines, so as not to pose an obstacle to the entry into force of the Statute. In the light of the two footnotes to that article, some redrafting would clearly be required.

16. Article Y met with the European Union's full support. As to article 10, option 1, based on the Singapore proposal, seemed to strike the right balance between opposing views. However, the European Union also favoured inclusion of language specifying the need for preservation of evidence and other precautionary measures. It also remained convinced that the independence of the Prosecutor must be preserved.

17. **Mr. MIRZAEE YENGEJEH** (Islamic Republic of Iran), speaking on behalf of the member countries of the Movement of Non-Aligned Countries, said that those countries were disappointed that the Bureau proposal contained no provision or option concerning the crime of aggression. Many of the difficulties that would allegedly result from its inclusion seemed merely to be pretexts for excluding that "mother of crimes"—which had been recognized by the Nuremberg Tribunal some fifty years previously—from the Statute. The Conference owed it to future generations to ensure that both aggression and the use of nuclear weapons were included as crimes in the Statute, as called for in the Cartagena Declaration of May 1998.

18. **Mr. CAFLISCH** (Switzerland) said that Switzerland saw no need for a threshold limiting jurisdiction over war crimes, but was willing, in a spirit of compromise, to accept option 2 in article 5 *quater*, despite its regret at the elimination of option 3, which had commanded far more support than option 1. Switzerland also regretted the deletion of its preferred option concerning prohibited weapons, the raising of the threshold for section D of article 5 *quater*, and the inclusion in sections C and D of additional reservations concerning the re-establishment of law and order and the defence of territorial integrity.

19. All those changes were clearly intended to restrict the Court's jurisdiction. If they were the price that must be paid for a system of automatic jurisdiction, inherent and unconditional, along the lines of the model proposed by the Republic of Korea, that price would perhaps be worth paying. However, Switzerland could not endorse the adoption of some other model, particularly if it took the form of an opting-out mechanism for war crimes. It also had the gravest reservations regarding the new article xx. It was particularly concerned that elements of crimes seemed to have ceased to play a purely indicative function.

20. In accepting the definitions of crimes proposed by the Bureau, his delegation would have to make concessions on matters to which it attached great importance—something it would be willing to do if the Court were to have automatic jurisdiction over all three core crimes. In that case, however, the only acceptable option for article 7 *bis* was option 1. As for article 7, his delegation called for the adoption of option 1 with regard to crimes against humanity and war crimes, and also for the replacement of the words "the State that has custody of the accused/suspect" with the words "the State on whose territory the accused/suspect is present". The requirement in option 3 of article 7 that the State of nationality of the accused or suspect must accept the jurisdiction of the Court would have the consequence that nationals of a non-State party would be outside the jurisdiction of the Court regardless of their whereabouts; whereas currently they were subject to the jurisdiction of States other than their own as soon as they crossed their national frontiers. Acceptance of option 3 would lead to an absurd situation in which such persons would be subject to foreign courts but not to the International Criminal Court. That option must thus be firmly rejected.

21. As to article 10, in a spirit of compromise Switzerland could accept option 1, provided that proper account was taken of the need for preservation of evidence. However, it could not accept option 2, as the duration of the

suspension established therein was not specified. On article 12, it favoured option 1. The procedures laid down in article 16 were extremely cumbersome and would seriously impair the effectiveness of the system: article 16 was thus unacceptable.

22. **Mr. SCHEFFER** (United States of America) said that the threshold for war crimes was a critical issue for many delegations. Not all war crimes were necessarily very serious: isolated violations of the Geneva Conventions, however gross, did not justify referral to the Court. His delegation had heard no persuasive argument that option 2 would prevent the prosecution of an individual war crime that fell below the threshold the Court should be addressing.

23. With regard to paragraph (o) of article 5 *quater*, subparagraph (vi) was an improvement on previous versions, but the treatment of additions to the prohibited weapons list was still too ambiguous. It must be made clear that any changes to the list must be approved by all States to whose nationals it would apply, under an appropriate mechanism in article 110. The term "inherently indiscriminate", which appeared in the *chapeau* to paragraph (o), was not grounded in Hague Law and should be avoided.

24. The United States noted the changes made to the *chapeaux* of sections C and D in an endeavour to facilitate consensus. It believed, however, that the change raising the threshold of applicability of section D to that of Protocol II to the Geneva Conventions should be rejected. The bulk of armed conflicts encountered in the real world were non-international, and that change would send the wrong message to civilian victims of internal armed conflicts.

25. His delegation was dismayed that the issues of gender justice dealt with in subparagraph (p *bis*) remained unresolved at that late stage in the Conference. It was also concerned that under paragraph 2 of article xx, elements of crimes would be adopted only after the entry into force of the Statute. Elements of crimes should be negotiated and adopted by the Preparatory Commission, so as to encourage early ratification by as many States as possible.

26. Paragraph (f) of section B should ideally not be included in the Statute. If it was to be included, the words "directly or indirectly", which were not drawn from Protocol I to the Geneva Conventions, should be deleted.

27. On article 7, the section dealing with preconditions for exercise of jurisdiction over genocide had only one option, to which his delegation objected strongly in principle, because it allowed the Court to exercise jurisdiction over the nationals and official acts of non-States parties, also contradicting the purpose of article 7 *bis* and its reference to automatic jurisdiction for genocide. Likewise, his delegation continued to reject option 1 of article 7 regarding preconditions for crimes against humanity and war crimes. The only approach consistent with well-established principles of international law was to combine options 2 and 3, so that the Court would have jurisdiction over the nationals and official actions of non-States parties only with the consent of the State of which the accused or suspect was a national and the State in the territory in which the crime had occurred.

28. As to article 7 *bis*, option 2 offered the most realistic and acceptable alternative. It could however be improved by making it clear that case-by-case consent to jurisdiction was also a possibility. With regard to article 10, his delegation did not believe that a specific time limitation could be imposed by a treaty separate from the Charter of the United Nations. Option 2 was thus to be preferred. As to articles 6 and 12, a substantial number of countries were completely opposed to the Prosecutor acting *proprio motu*, and those proposals should thus be deleted. Lastly, his delegation continued to support the inclusion of article 16 in the Statute.

29. **Mr. CHUKRI** (Syrian Arab Republic) said that his delegation strongly supported the statement by the representative of the Islamic Republic of Iran on behalf of the Non-Aligned Movement concerning the crime of

aggression, inclusion of which was supported by over a hundred States, and which had been described by the Nuremberg Tribunal as the supreme international crime. The fact that no comprehensive definition had been found did not justify eliminating that crime entirely, or placing it on the same footing as the treaty crimes. Unless the crime of aggression was included, his delegation might have to reconsider its position with regard to the Statute as a whole.

30. Many proposals submitted with regard to the role of the Security Council were not properly reflected in the Bureau proposal. If it was to be left to the Security Council, with its notorious right of veto, to determine what matters were to be referred to the Court, the latter's independence would be severely compromised.

31. Although Singapore's amended proposal, reflected in option 2, perhaps offered a solution to the problem of the Court's jurisdiction, a unified approach to all crimes was called for. If the Court did not have automatic jurisdiction over all crimes to be included in the Statute, the State of nationality would have the right to block the Court. His delegation thus supported article 7 *ter* and option 1 for article 7 *bis*.

32. Article xx, concerning elements of crimes, would create an unacceptable precedent, whereby unresolved problems were consigned to an annex in the interests of meeting the deadline for finalization of the Statute. It must also be asked what role would be left to the Court itself if the Statute were to lay down the elements of every crime. The relationship between the Charter of the United Nations and the Statute of the International Court of Justice offered a salutary example in that regard; determination of the elements of the crime should be left to the Court.

33. With regard to internal conflicts, his delegation continued to oppose section D and to support section C, provided that the threshold was modified. It was also dismayed to find that, contrary to the wish of the vast majority of States present and in disregard of the Cartagena Declaration of May 1998, nuclear weapons had been eliminated from the Statute. It was incomprehensible that while chemical and biological weapons were prohibited, the most pernicious of all weapons were to be excluded from the scope of the Statute.

34. **Mr. LAHIRI** (India) said that the Bureau proposal made little effort to address several of his delegation's most serious concerns. First, the draft continued to insist on the Security Council having the power to bind States not parties to the Statute. As the Council would almost certainly include non-States parties among its members, that provision would confer on such States the power to compel both States parties and other non-States parties to submit to the Court's jurisdiction, in violation of the law of treaties, as well as conferring on the Council a role never envisaged for it by the Charter.

35. Secondly, nuclear weapons were excluded from the list of weapons whose use was considered inherently indiscriminate, on the grounds that their exclusion would ensure the widest possible acceptance of the Statute. That was a shameful compromise. The International Court of Justice, in its Advisory Opinion on the question, had confirmed that the use of nuclear weapons would be a contravention of international humanitarian law; and the fact that no convention banning their use had been negotiated did not mean that the Statute could ignore their existence.

36. Thirdly, while his delegation could accept automatic jurisdiction for genocide, it would insist on opt-in jurisdictions for all other crimes. As safeguards against interference by the Court, the territorial State and the State of custody must give their consent before it could exercise its jurisdiction. The complementarity provisions must also be strengthened. Nor did his delegation accept *proprio motu* powers for the Prosecutor: only States parties should have the power to refer situations to the Court.

37. India continued to believe that the Court should not have jurisdiction over internal armed conflict except where a State's administrative and legal machinery had ceased to function. Lastly, his delegation found it incomprehensible

that the Statute should fail to address terrorism and drug trafficking—truly international crimes that had taken more lives than the so-called core crimes in recent decades. India reserved the right to table formal amendments on all those concerns when the Committee of the Whole met to adopt the draft Statute for referral to the Plenary.

38. **Mr. COUGHLIN** (Holy See) said there was an urgent need for some international juridical body to exercise jurisdiction over international drug trafficking, an organized criminal activity with which national Governments found themselves ill-equipped to cope. His delegation was also deeply concerned about the illegal arms trade carried on by organized criminal groups, which increased the likelihood of international and internal armed conflict and resulted in the destruction of national structures and cultures. The Holy See strongly endorsed the Bureau proposal that those crimes should be placed under the jurisdiction of the Court by a subsequent protocol or review conference.

39. With respect to article 12, his delegation favoured a strong and independent Prosecutor, and believed that the Statute as a whole provided for adequate safeguards against possible abuses of prosecutorial power. It was also confident that only individuals of the highest moral principles and ethical conduct would be chosen to serve as Prosecutor and that the appointment process would rise above narrow political and ideological concerns. The process for bringing an accused person to justice must include the right to competent legal counsel—free of charge where appropriate. In addition, as the Rules of Procedure and Evidence were drafted, more specific language should be developed to protect such fundamental rights as specific notice of the charges, availability of all evidence, adequate time and resources to prepare the defence, cross-examination of all witnesses, admissibility of evidence and protection of customary privileges.

40. **Mr. LIU Daqun** (China) said that his delegation preferred option 1 for the *chapeau* of article 5 *quater* and that, as currently worded, paragraph (o) of section B did not meet its concerns. The addition of safeguards in section D was welcome, but his delegation had difficulty in accepting paragraphs (d), (f), (h), (j) and (k); the safeguards contained in sections C and D should reproduce the wording of article 3 of Protocol II to the Geneva Conventions.

41. With regard to the preconditions to the exercise of jurisdiction over genocide in article 7, China could accept the possibility of automatic jurisdiction. However, for non-States parties, the consent of the State of nationality and of the territorial State should be required. As for preconditions in the case of crimes against humanity and war crimes, there should be opt-in jurisdiction, with consent of the State of nationality and the territorial State. Consequently, a compromise between options 2 and 3 was needed.

42. On article 7 *bis*, his delegation favoured option 2. On article 7 *ter*, it favoured deletion of the second sentence, as the problem of cooperation was covered in Part 9 of the Statute. His delegation was still engaged in consultations regarding article 10; option 2 might be acceptable if its drafting were improved. In his delegation's view, article 12 should be deleted.

43. **The CHAIRMAN** invited the Committee to turn to consideration of the reports of the Working Groups and Coordinators.

Parts 5, 6 and 8 of the draft Statute (*continued*)

44. **Ms. FERNANDEZ de GURMENDI** (Argentina), Coordinator for Parts 5, 6 and 8, introducing the report of the Working Group on Procedural Matters in document A/CONF.183/C.1/WGPM/L.2/Add.6, said that the report transmitted for consideration article 57 *bis*, paragraph 3 (d) and (e), article 58, paragraph 5, and the complete text of article 60, paragraph 2, from Part 5; article 67, paragraph 1 (a) and (f) and paragraph 2, article 68, paragraphs 3,

4, 5 and 7, and article 69, paragraphs 1 and 4 *ter*, from Part 6; and article 81, paragraph 1 (e), from Part 8. It also announced the deletion from Part 6 of article 68, paragraphs 8 and 9, and of article 69, paragraph 7.

45. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

46. *It was so decided.*

Article 20

47. **Mr. SALAND** (Sweden), Coordinator for Article 20, introducing the report of the Working Group on article 20, "Applicable law" (A/CONF.183/C.1/WGAL/L.2), said that the Working Group had reached agreement as to article 20, paragraphs 1 and 2, which it now transmitted to the Committee for consideration. Discussions were still pending on paragraph 3.

48. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer to the Drafting Committee the articles contained in the report of the Working Group.

49. *It was so decided.*

Article 49

50. **Mr. RWELAMIRA** (South Africa), Coordinator for Part 4, said it would be seen from document A/CONF.183/C.1/L.45/Add.3 that article 49, paragraph 1, the last outstanding article in Part 4, dealt with the privileges and immunities of the Court. The paragraph covered immunities relating to assets, properties of the Court, archives and communications of the Court. The view had been taken in the informal consultations that the matter would need further discussion and elaboration, preferably within the Preparatory Commission. He commended the article to the Committee of the Whole for consideration and transmission to the Drafting Committee.

51. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer article 49 to the Drafting Committee.

52. *It was so decided.*

Articles 94, 99 and 100

53. **Ms. WARLOW** (United States of America), Coordinator for Part 10, said that the report of the Working Group on Part 10, "Enforcement" (A/CONF.183/C.1/WGE/L.14/Add.1), referred to the Committee of the Whole article 94, article 99, paragraph 3, and article 100. She drew attention to the deletion of article 93 and of article 99, paragraph 2. The Working Group recommended those articles for consideration by the Committee and referral to the Drafting Committee. Consideration of one remaining article, article 101, was still pending.

54. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer the articles contained in the report of the Working Group to the Drafting Committee.

55. *It was so decided.*

Preamble and Final Clauses

56. **Mr. SLADE** (Samoa), Coordinator for the Preamble and the Final Clauses, introducing document A/CONF.183/C.1/L.61, said that the fact that the entire text of the preamble was enclosed within square brackets reflected the need for further discussion. However, the current provision was accepted as the basis for further work. In the penultimate preambular paragraph, the square brackets in the word "relation[ship]" could now be deleted.

57. As to the Final Clauses, article 108 was recommended to the Committee for reference to the Drafting Committee. Article 109 still retained its four options. Article 110 also required final decisions, particularly as to the time periods referred to in paragraph 1 and the voting methods and majorities referred to in paragraphs 2 to 6. In the fourth line of article 110, paragraph 1, the eighth line of article 110 *bis*, paragraph 1, the second line of article 111, paragraph 1, and the third line of article 111, paragraph 2, the words "some other person" should be replaced with the words "such other person". Article 110 *bis* also needed to be finalized as to the time period and voting majorities. There was one outstanding issue relating to the time period in article 111, paragraph 1. Articles 112, 115 and 116 were ready for submission to the Drafting Committee. Article 113 was still the subject of consultations, and article 114 required decisions on the relationship between entry into force and the Rules of Procedure and Evidence, as well as on the number of required ratifications.

58. **Mr. P. S. RAO** (India) said that his delegation would require further consultations before it was able to endorse article 108.

59. **Mr. AL ADHAMI** (Iraq) said that his delegation also had reservations regarding article 108.

60. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Committee of the Whole wished to refer articles 108, 112, 115 and 116, as orally amended, to the Drafting Committee, on the understanding that it might return to certain aspects thereof in due course.

61. *It was so decided.*

Part 2 of the draft Statute (continued)

Proposal prepared by the Bureau (continued)

62. **The CHAIRMAN** invited the Committee to resume consideration of the Bureau proposal for Part 2 contained in document A/CONF.183/C.1/L.59 and Corr. 1.

63. **Mr. ASAMOAH** (Ghana) said that aggression was the mother of war crimes and it was absolutely essential that the Statute should reflect that fact. As for nuclear weapons, their exclusion from the list of prohibited weapons rendered that list wellnigh meaningless. While accepting the Non-Aligned Movement's position with regard to the inclusion of other crimes, his delegation believed that, in the interests of securing a satisfactory outcome to the Conference, those crimes should be incorporated in the Statute at a later date.

64. His delegation had difficulty in understanding a number of passages in the Bureau proposal, on account of the way in which they were drafted. For instance, in article 5, the words "as such" preceding the enumeration of acts of genocide should presumably read "such as". In article 5 *ter*, paragraph 2 (a *bis*), the phrase "infliction of conditions of life" was incomprehensible.

65. On article 5 *quater*, concerning war crimes, his delegation favoured option 2. Regarding section B, it was somewhat concerned that the scope of paragraph (a *ter*) was restricted to activities in accordance with the Charter of the United Nations, as regional organizations were often also involved in such exercises. That provision should be expanded to take account of such situations.

66. His delegation found it hard to see what article xx was intended to achieve, as some elements of crimes had already been indicated in earlier proposals. With regard to preconditions to the exercise of jurisdiction over crimes against humanity and war crimes, his delegation favoured option 1, as it also did in article 7 *bis*. With regard to the role of the Security Council, it preferred option 2. However, whichever option was adopted, it would still be possible for the Security Council to repeat its request *ad infinitum*, thereby undermining the work of the Court. It might therefore be wise to specify some limit beyond which further requests by the Security Council would not be entertained.

67. With regard to article 12, his delegation favoured option 1. On article 16, it had difficulty in understanding the last sentence of paragraph 2, which referred to situations in which the Prosecutor was not aware that an investigation was taking place. How could the Prosecutor defer to investigations of which he or she was unaware?

68. **Mr. WESTDICKENBERG** (Germany) said that, like the United States delegation, his delegation continued to believe that the same standards should apply in section D as in section C of article 5 *quater*. It thus had reservations regarding the second part of the *chapeau* prefacing section D.

69. With regard to article xx, his delegation's position was that the principle of legality was fully ensured by the definitions of the three core crimes to be contained in the Statute, which had been meticulously worked out in a process that had taken several years, and that there was thus no need to embark on a new discussion. Neither the entry into force of the Statute nor the commencement of the Prosecutor's investigations should be dependent upon general agreement on, or even formal adoption of, so-called elements of crimes. Paragraph 4 of that article should thus either be deleted or made non-binding, for example, by amending the word "shall" to "should".

70. With regard to acceptance of jurisdiction, his delegation, like so many others, could not accept option 2 of article 7 *bis*, which would lead to an à la carte jurisdiction and would also confer on States parties all the benefits and privileges of membership without their concomitant obligations. An opt-in approach could have the further disadvantage of reducing the core crimes—which had already dwindled to three—to the single core crime of genocide. What was needed was the opposite approach—a uniform and coherent regime for all three core crimes. His delegation thus strongly advocated adoption of option 1.

71. With regard to article 7, Germany concurred with those States—a large majority—that found paragraph 1 and option 1 for paragraph 2 acceptable. In its view, option 3 would be an incentive for States not to become parties to the Statute. With regard to article 10, his delegation continued to support option 1. In article 12, it continued to regard option 1 as of crucial importance. Viable and effective safeguards already existed against frivolous investigations by a *mala fide* Prosecutor.

72. Article 15 must be retained in its entirety. Article 16, on the other hand, still required, at the very least, substantial amendment. With regard to paragraph 1, it should be sufficient to notify only the four States mentioned in the proposal of the Republic of Korea. The burden of challenge should lie, not with the Court, but with the State, which was much closer to the information. Furthermore, if a non-State party chose the challenge procedure, it would have in return to accept the obligation to cooperate fully with the Court. Pending the outcome of the consultations his delegation continued to reserve its position on article 16.

73. Lastly, his delegation deplored the fact that the efforts of a number of delegations over a period of two years to have the crime of aggression included in the Statute had proved vain. It noted with appreciation that the Bureau would if necessary propose that the interest in addressing that crime should be reflected in some other manner.

74. **Mr. SLADE** (Samoa) said that the relationship between articles 6, 7 and 7 *bis* raised fundamental difficulties which led to confusion. "Custody" jurisdiction and "custody ... with respect to the crime" were new concepts in international law that seemed fraught with possibilities for slippage. His delegation agreed with much that had been said by the delegation of Switzerland on that issue, and strongly supported inherent universal jurisdiction with no possibilities for opting in or opting out.

75. Section D, on non-international armed conflict, had been drained of much of its content. In particular, the reference to prohibited weapons seemed to have vanished. He understood why nuclear weapons had been forced out; but gone, too, was any reference to other devices. Did the Conference really want to send the message that it was acceptable to use poison, dumdum bullets, biological and chemical weapons in internal conflict?

76. Paragraph (o) came as a disappointment. Its *chapeau* was based on the premise of proscribing weapons in certain general categories; however, all that was left of those categories was a short list of absolutely prohibited weapons. Subparagraph (vi) of paragraph (o) was also void of operational effect. The reference made by some delegations to exploding bullets seemed to have been ignored. Article Y, however, was a crucial provision that his delegation welcomed. Article 10 was now much improved, and Samoa favoured its option 1. Elements of crimes had a useful role to play, if presented in the form of guidelines. Finally, his delegation strongly supported the provisions concerning the *proprio motu* power of the Prosecutor, which provided sufficient safeguards.

77. **Sir Franklin BERMAN** (United Kingdom) said that a successful outcome to the negotiations on article 5 must necessarily involve abandoning attempts to include therein aggression, the treaty crimes, and, indeed, nuclear weapons—notwithstanding the remark by one delegation which had grossly distorted the tenor of the Advisory

Opinion of the International Court of Justice on the question. The statement by the presidency of the European Union had indicated how the crime of aggression might be addressed once the Statute had been adopted.

78. As to the definitions, he endorsed other delegations' views about the wisdom of having a reasonably short list of proscribed weapons under section B, paragraph (o). However, the phrase "which are inherently indiscriminate", which had been included in the *chapeau*, seemed both factually incorrect and undesirable: it would, for example, have extremely restrictive consequences in relation to subparagraph (vi), which allowed for the inclusion of additional weapons in the future. It was perfectly possible that a decision might be taken to proscribe weapons on grounds other than their inherently indiscriminate nature.

79. The cluster of articles relating to exercise of jurisdiction was, as the representative of Ghana had noted, extremely confused and difficult to follow, and would require re-ordering along the lines suggested by the Coordinator. Further clarification was needed of the position of States not parties to the Statute. In that context, one must guard against a situation arising in which the operation of the Statute would be dependent on the consent of the very persons against whom the jurisdiction of the Court should be operating.

80. The notion of automatic jurisdiction with respect to core crimes was one to which his delegation was deeply attached, and the objective must be to create the greatest possible measure of automatic jurisdiction over the broadest reasonable definition of what constituted the core crimes. His delegation was gratified to note that very considerable progress was being made with regard to crimes in internal conflicts, under sections C and D in article 5. The *chapeau* to section D posed a problem: it was important to avoid setting a threshold so high as to remove from the Court's jurisdiction the very cases that had given rise to such grave concerns of late.

81. With regard to the clause at the end of section D, that clause was inspired by article 3 of Protocol II to the Geneva Conventions—indeed, one representative had asked for the whole of that article to be included. In his delegation's view, article 3 of Protocol II as worded was not suitable for inclusion in the Statute. But the ideas expressed therein were valuable ones, and their essence could be reproduced as part of the endeavour to ensure that the widest possible range of crimes in internal armed conflict fell within the jurisdiction of the Court.

82. With regard to article 10, the member States of the European Union saw option 1 as striking a proper balance. However, there was still room for drafting improvements, perhaps incorporating some elements of option 2, so as to capture both the inherent powers of the Security Council and the judicial independence of the Court.

83. **Ms. PLEJIĆ-MARKOVIĆ** (Croatia) said her delegation broadly endorsed the statement made by the representative of Austria on behalf of the European Union. However, on article 5, it continued to favour subsequent inclusion of the crime of aggression in the Statute at the review conference to be convened in accordance with article 111. On war crimes, its preference was for option 2. With regard to paragraph (o), it was concerned that landmines were not included in the list of proscribed weapons. On elements of crimes, it endorsed the comments of the representative of Germany. If article xx were adopted, its paragraph 4 should either be made non-binding or else deleted.

84. On the cluster of jurisdictional issues, Croatia favoured automatic jurisdiction in article 7 *bis*. On preconditions to the exercise of jurisdiction, it could accept paragraph 1, and it favoured option 1 in paragraph 2. Options 2 and 3 were completely unacceptable.

85. On the role of the Security Council, Croatia favoured option 1, provided that reference was made to the need for preservation of evidence. It also supported an independent prosecutor with *proprio motu* powers. The procedures under article 16 were too cumbersome, and the article should be deleted.

The meeting rose at 1.05 p.m.